St. George Warehouse *and* Merchandise Drivers Local No. 641, International Brotherhood of Teamsters.[1] Cases 22–CA–23223, 22–CA–23259, and 22–CA–23270

September 30, 2007

SUPPLEMENTAL DECISION AND ORDER REMANDING

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN, SCHAUMBER, KIRSANOW, AND WALSH

On October 30, 2002, Administrative Law Judge Margaret M. Kern issued the attached Supplemental Decision. The Respondent filed exceptions and a supporting brief.[2]

The Board has considered the Supplemental Decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Supplemental Decision and Order Remanding.

The issue in this backpay proceeding is which party bears the burden of production when a respondent contends that a discriminatee has failed to mitigate damages by making a reasonable effort to find work.[3] It is well settled that backpay liability may be mitigated if the discriminatee neglected to make reasonable efforts to find interim work.[4] "The defense of willful loss of earnings is an affirmative defense, and the employer bears the burden of proof."[5]

We reaffirm that a respondent has the burden of persuasion as to the contention that a discriminatee has failed to make a reasonable search for work. However, we reach a different conclusion with respect to a part of the burden of going forward with evidence. The contention that a discriminatee has failed to make a reasonable search for work generally has two elements: (1) there were substantially equivalent jobs within the relevant geographic area, and (2) the discriminatee unreasonably failed to apply for these jobs. Current Board law places on the respondent-employer the burden of production or going forward with evidence as to both elements of the defense. As to the first element, we reaffirm that the respondent-employer has the burden of going forward with the evidence. However, as to the second element, the burden of going forward with the evidence is properly on the discriminatee and the General Counsel who advocates on his behalf to show that the discriminatee took reasonable steps to seek those jobs. They are in the best position to know of the discriminatee's search or his reasons for not searching. Thus, following the principle that the burden of going forward should be placed on the party who is the more likely repository of the evidence, we place this burden on the discriminatee and the General Counsel.

In the instant case, the Respondent has met its burden as to the first element of the defense by presenting sufficient evidence of comparable employment opportunities in the relevant job market. The discriminatees and General Counsel have not met the burden as to the second element because no evidence was presented concerning the nature and extent of the discriminatees' job searches. Because existing Board law did not impose such an obligation on the General Counsel, we remand the case to the

[1] We have amended the caption to reflect the disaffiliation of the International Brotherhood of Teamsters from the AFL–CIO effective July 25, 2005.

[2] No exceptions were filed to the judge's rejection of the Respondent's claims that Leonard Sides, one of the two discriminatees in this case, suffered from a medical condition that precluded him from working overtime during the backpay period and that Jesse Tharp, the other discriminatee, took himself out of the New Jersey labor market when he moved to Florida.

[3] A respondent may also reduce its backpay liability by showing that a discriminatee had more interim earnings than those set forth in the compliance specification. That situation is not presented in this case, and we do not address it.

[4] See, e.g., *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575–576 (5th Cir. 1966); *Rainbow Coaches*, 280 NLRB 166, 179–180 (1986), enfd. mem. as modified 835 F.2d 1436 (9th Cir. 1987), cert. denied 487 U.S. 1235 (1988); *NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 174 fn. 3 (2d Cir. 1965) (It is accepted by the Board and reviewing courts that a discriminatee is not entitled to back pay to the extent that he fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or voluntarily quits alternative employment without good reason.), cert. denied 384 U.S. 972 (1966).

[5] *NLRB v. Ryder System, Inc*., 983 F.2d 705, 712 (6th Cir. 1993) (citing *NLRB v. Westin Hotel*, 758 F.2d 1126, 1129 (6th Cir. 1985)). Contrary to any implication arising from the dissent's reference to a few cases that could arguably be read to hold an employer to a higher burden of proof, we stress that a respondent, in proving willful loss of earnings, need not show that a particular discriminatee *would have* secured suitable interim employment had he only made the required reasonable effort before backpay liability properly may be reduced. See *NLRB v. The Madison Courier, Inc.*, 472 F.2d 1307, 1319 (D.C. Cir. 1972); *Tubari Ltd., Inc. v. NLRB*, 959 F.2d 451, 454–455 (3d Cir. 1992). Nor do we disturb the principle that if a discriminatee "has exercised no diligence whatsoever 'the circumstance of a scarcity of work and the possibility that none would have been found even with the use of diligence is irrelevant.'" *Tubari*, supra (quoting *Madison Courier,* 472 F.2d at 1319). See also *Arlington Hotel Co.*, 287 NLRB 851, 852–853 (1987), enfd. in relevant part 876 F.2d 678 (8th Cir. 1989); *American Bottling Co.*, 116 NLRB 1303, 1307 (1956); *Knickerbocker Plastic Co.*, 132 NLRB 1209, 1219 (1961).

judge to reopen the record and permit the parties to produce evidence consistent with this decision.

I. BACKGROUND

In the underlying unfair labor practice proceeding,[6] the National Labor Relations Board (the Board) found that the Respondent, which performs warehousing services from its facility in Kearney, New Jersey, violated Section 8(a)(1) and (3) of the Act when it discharged Leonard Sides, a forklift operator, and Jesse Tharp, a warehouse worker. The Board ordered the Respondent, inter alia, to make Sides and Tharp whole. On May 28, 2002,[7] the Regional Director issued a compliance specification setting forth the amount of backpay assertedly owed to Sides and Tharp. The backpay period for the two employees began in March 1999 and ended on September 1, 2000. In a July 17 letter, the General Counsel advised the Respondent that Tharp was currently incarcerated in Florida. In that letter, the General Counsel also provided the Respondent with the name and address of the prison where Tharp was being held.

The backpay hearing was held on October 8. The General Counsel relied solely on the amended compliance specification and called no witnesses and introduced no evidence of the discriminatees' mitigation efforts. The Respondent did not challenge the General Counsel's method of calculating the backpay amounts for Tharp and Sides or the manner in which the General Counsel arrived at the figures in the compliance specification. The Respondent claimed, however, that the discriminatees failed to mitigate their damages. In this regard, the Respondent asserted that both Sides and Tharp made insufficient efforts to seek interim employment.

In support of its case, the Respondent called Donna Flannery, a vocational employability specialist. Flannery conducted a labor market study in the New Jersey area to determine the availability of jobs for warehousemen, forklift operators, and similar occupations during the backpay period. Flannery examined published sources such as the *Dictionary of Occupational Titles*, *Occupational Employment Statistics*, *Projections 2008*, and *New Jersey Employment and Population in the 21st Century*, as well as want ads in local newspapers. She also performed an analysis of the transferability of job skills. Flannery concluded that a sufficient number of comparable jobs were advertised as open and available during the backpay period for warehouse workers and forklift operators. Flannery made the following observation:

> It is also my opinion, based upon the information presented, that neither of these two job seekers made a diligent effort to seek and obtain new employment. It appears, from the information presented, that job efforts did not even consist of a minimal amount of effort to locate employment. Minimally, the advertisements could have been reviewed for openings. There were plenty of resources available, at no cost, such as assistance in reviewing/composing cover letters and resumes, and they could have sought openings through internet job sites, explored industrial directories for companies with suitable openings, researched magazines or publications in the warehouse industry for leads, and networked through job fairs and open houses.

Flannery had not interviewed Tharp or Sides, and neither discriminatee was present at the hearing. No one who had any knowledge of their actual efforts to find employment testified. The General Counsel called no witnesses and relied solely on the amended compliance specification.[8]

II. THE JUDGE'S DECISION

The Respondent argued to the judge that it did not bear the burden of producing evidence as to whether the discriminatees searched for work. It asserted that once it had shown that a significant number of comparable jobs were available in the relevant market, the burden shifted to the General Counsel to establish that they had made reasonable efforts to find work. The judge rejected this argument and held that the entire burden of showing that the discriminatees failed to mitigate their damages rests exclusively on the Respondent; under no circumstances does it shift back to the General Counsel. Applying this principle, the judge concluded that the Respondent failed to produce facts sufficient to show, by a preponderance of the evidence, that the discriminatees failed to mitigate their damages. The judge found that Sides worked in two out of the seven quarters covered by the backpay period and that Tharp worked in four out of seven. Even accepting testimony by the Respondent's specialist that jobs were available during those periods when Sides and Tharp were unemployed, the judge found no evidence that they failed to seek out such jobs. The judge held that

[6] 331 NLRB 454 (2000), enfd. mem. 261 F.3d 493 (3d Cir. 2001).

[7] All dates hereafter are 2002, unless otherwise indicated.

[8] At the hearing, the Respondent attempted, by way of stipulation, to introduce several documents, including a backpay questionnaire that had been completed by Sides. These documents were a portion of the General Counsel's compliance file that had been provided to the Respondent. Counsel for the General Counsel refused to stipulate to the introduction of these selected documents on the ground that they did not represent the full efforts of the discriminatees to find work. She had no objection to the introduction of the complete file. The Respondent, however, would not stipulate to the introduction of the complete file. The judge sustained the General Counsel's objection to the proffer of the selected documents.

the specialist's testimony that neither Sides nor Tharp made even a "minimal amount of effort to locate employment" was "devoid of any factual support" in the record, given that she did not interview the discriminatees or anyone who had knowledge of their job search efforts.[9]

III. THE RESPONDENT'S CONTENTION

The Respondent acknowledges that it bears the burden of persuasion as to whether the discriminatees failed to mitigate damages by seeking interim employment. However, the Respondent asserts that once it establishes, as it did here, that suitable work was available for the discriminatees, the General Counsel properly should bear the initial burden of producing evidence concerning the discriminatees' efforts to seek work.

IV. ANALYSIS

The relevant legal principles have been set out in many cases. We first briefly review these principles. We then set out the principle we modify today and our reasons for this change.

A. Controlling Legal Principles

"A back pay order is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice." *Nathanson v. NLRB*, 344 U.S. 25, 27 (1952). When loss of employment is caused by a violation of the Act, a finding by the Board that an unfair labor practice was committed is presumptive proof that some backpay is owed. *Arlington Hotel Co.*, supra at 855. In compliance proceedings, the General Counsel bears the burden of proving the amount of gross backpay due. *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963); *Kawasaki Motors Mfg. Corp. v. NLRB*, 850 F.2d 524, 527 (9th Cir. 1988). Once the General Counsel has met this burden, the respondent may establish affirmative defenses that would reduce its liability, including willful loss of earnings. *Florida Tile Co.*, 310 NLRB 609 (1993), enfd. mem. 19 F.3d 36 (11th Cir. 1994); *NLRB v. Brown & Root*, supra.

Longstanding remedial principles establish that backpay is not available to a discriminatee who has failed to seek interim employment and thus incurred a willful loss of earnings. See, e.g., *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177, 198 (1941); *NLRB v. Mastro Plastics Corp.*, 354 F.2d at 175.[10] In this regard, the NLRB Casehandling Manual (Part Three) Compliance Section 10558.1 (2007) provides, in pertinent part:

> A discriminatee must make reasonable efforts during the backpay period to seek and to hold interim employment. This is known as the discriminatee's obligation to mitigate. A discriminatee is not due backpay for any period within the backpay period during which it is determined that he or she failed to make a reasonable effort to mitigate . . . .

In determining the amount of backpay due, the Board tolls backpay during any portion of the backpay period in which a discriminatee failed to mitigate. See id. The ultimate burden of persuasion is on the respondent "employer [who] may mitigate his backpay liability by showing that a discriminatee 'willfully incurred' loss by a 'clearly unjustifiable refusal to take desirable new employment.'" *Hagar Mangement Corp.*, 323 NLRB 1005, 1006 (1997) (quoting *Phelps Dodge Corp v. NLRB*, supra at 199–200). Where an employer contends that a discriminatee did not make the requisite effort to mitigate his damages, the willful idleness issue is determined on the basis of the record as a whole. *NLRB v. Madison Courier, Inc.*, 472 F.2d at 1318.

The term "burden of proof" typically encompasses two separate burdens. One burden is that of producing or going forward with evidence, satisfactory to the trier of fact, of a particular fact in issue. We shall refer to this burden as the burden of production. The second is the burden of persuading the trier of fact that the alleged fact is true. We shall refer to this burden as the burden of persuasion. See *McCormick on Evidence,* Section 336 (4th ed. 1992). The burden of production may shift during the course of a hearing, but the burden of persuasion always remains with the party upon whom it is placed. Id. at Sections 336, 337.

With regard to the affirmative defense of willful loss of earnings, the Board has held that the burden of production as well as the burden of persuasion rests solely on the respondent. Thus, the respondent generally must produce evidence and prove that there were suitable jobs available for someone with the discriminatee's qualifications *and* that the discriminatee's job search was unreasonable. *Black Magic Resources*, 317 NLRB 721, 721–722 (1995); *Lloyd's Ornamental & Steel Fabricators, Inc*., 211 NLRB 217, 218 (1974). "To meet this burden, the employer must affirmatively demonstrate that the employee 'neglected to make reasonable efforts to find interim work.'" *Rainbow Coaches*, 280 NLRB at 180 (quoting *NLRB v. Miami Coca-Cola Bottling Co*., 360 F.2d at 576).

[9] The judge adhered to her decision to exclude from evidence selected portions of the compliance file. We find that the judge did not abuse her discretion in this regard.

[10] Contrary to the dissent, we do not view this allocation of burdens as mandated by certain court criticism of the Board's current approach, discussed infra at fn. 11. We simply conclude, for the reasons set forth here, that the allocation of the burden of producing evidence we adopt today is the better approach.

B. The Shifting of the Burden of Production in Willful Loss of Earnings Cases

The Board's approach, set forth above, has not been universally accepted.[11] Today, we modify the principles governing the issue of willful loss of earnings in one respect only. When a respondent raises a job search defense to its backpay liability and produces evidence that there were substantially equivalent jobs in the relevant geographic area available for the discriminatee during the backpay period, we will place on the General Counsel the burden of producing evidence concerning the discriminatee's job search. We set forth below the cogent reasons for making this change.

The General Counsel may meet this burden by producing the discriminatee to testify as to his efforts at seeking employment. Indeed, this is the usual situation.[12] In other circumstances, however, the General Counsel may not be able to produce the discriminatee to testify. Certainly, "there are instances—death of a discriminatee is the most obvious—when it is not possible to obtain" the testimony of a discriminatee.[13] In circumstances where the General Counsel does not produce the discriminatee, the General Counsel may satisfy his burden of production by providing other competent evidence as to the discriminatee's job search. Such evidence may be in the form of documentary evidence or the testimony of someone familiar with the discriminatee's job search.[14] We are not insisting that the General Counsel produce the discriminatee to testify.

As noted, we make no change in the ultimate burden of persuasion on the issue of a discriminatee's failure to mitigate; the burden remains on the respondent to prove that the discriminatee did not mitigate his damages "by using reasonable diligence in seeking alternate employment." *Mastro Plastics*, supra at 175.[15]

This shifting of the burden of production is supported by several practical reasons. First, the information concerning the discriminatee's job search is within the knowledge of the General Counsel and/or the discriminatee, and "the burden of going forward normally falls on the party having knowledge of the facts involved." *NLRB v. Mastro Plastics*, supra at 176 (citing *United States v. New York, N.H. & H.R.R. Co*., 355 U.S. 253, 256 fn. 5 (1957)); 9 *Wigmore, Evidence* Section 2846, at 275 (3d

[11] The circuit law on the General Counsel's burden to produce the discriminatee to testify and on the burden of production generally is mixed. The Second Circuit has held that the General Counsel has the burden of producing testimony by each available discriminatee that a willful loss of earnings has not occurred. *NLRB v. Mastro Plastics Corp.*, supra at 175. However, in *NLRB v. Consolidated Dress Carriers, Inc.*, 693 F.2d 277, 279 (2d Cir. 1982), the court characterized the General Counsel's *Mastro Plastics* burden as an "initial obligation to produce the employees to testify." In *NLRB v. Ferguson Electric Co.*, 242 F.3d 426, 434 (2d Cir. 2001), the Second Circuit stated that "[i]t is not obvious that the *Mastro Plastics* holding has any relevance in a case such as this, where the parties' joint motion to transfer the proceeding to the Board stated that 'no oral testimony [was] necessary or desired by any of the parties' and, as a result, [the discriminatee's] availability and whereabouts were arguably beside the point." The court also noted that the "*Mastro Plastics* rule failed to inspire universal adherence or enthusiasm." Id. at 435 fn. 6.

The D.C. Circuit purportedly adopted the reasoning of *Mastro Plastics*, at least insofar as the Second Circuit upheld an arrangement in which a discriminatee's backpay award was held in escrow until the discriminatee could be "produced to testify, or some other method adopted to enable the Company adequately to inquire of him about matters which would mitigate the amount, if any, due to him." *NLRB v. Rice Lake Creamery Co.*, 365 F.2d 888, 891–892 (D.C. Cir. 1966).

The Fifth Circuit has rejected the *Mastro Plastics* view, holding that the Board need not produce the testimony of each and every employee. The court stated:

> [W]e are not entirely convinced that the employees' knowledge about their efforts to find interim work and the financial success they encountered can realistically be imputed to the Board. More important, to require the Board to call every employee in every case would place an intolerable burden on the agency, particularly where large numbers of employees were involved and there was little basis to dispute the Board's calculations. A better rule would leave the burden on the employer, who could produce the employees' testimony whenever necessary to dispute the Board's figures, but who certainly would not find it necessary to call every employee involved. We conclude, however, that the employer should be given every opportunity to call the employees to testify on the issue of their interim earnings, and that upon the employer's request, the Board should make available any information in its possession relevant to the whereabouts of the employees. [Footnotes omitted.]

NLRB v. Mooney Aircraft, 366 F.2d 809, 813–814 (5th Cir. 1966).

The Fourth Circuit agreed with the Fifth Circuit. *Florence Printing Co. v. NLRB*, 376 F.2d 216, 223 (4th Cir. 1967), cert. denied 389 U.S. 840 (1967) (We are persuaded that *Mooney Aircraft* expresses the correct view and that we should follow it.).

The Eighth Circuit has found that the Board's Rules and Regulations do not "place on the Board at a back pay hearing, the burden of proof on such issues as an employee's availability for employment, or of the availability of employment for the employees, or the amount of interim earnings, or that the employee could not have obtained interim employment by the exercise of reasonable diligence." *NLRB v. Brown & Root*, 311 F.2d at 454.

[12] NLRB Casehandling Manual (Part Three) Compliance Sec. 10662.4 (2007) also directs the Region's trial attorney to cooperate with a respondent in efforts to obtain the discriminatee's presence. It provides in pertinent part: "Upon request, the trial attorney should furnish respondent with the desired discriminatee's present or last known address so that the individual may be subpoenaed or located."

[13] *Mastro Plastics*, supra at 178.

[14] This listing of alternative methods of proof is not intended to be exclusive.

[15] Our decision today also makes no change in the escrow procedure that may be ordered by the Board or a court or that may be agreed to by the parties when a discriminatee is temporarily unavailable or cannot be located. See, e.g., *NLRB v. Brown & Root*, supra; NLRB Casehandling Manual (Part Three) Compliance Sec. 10582.3 (2007). This procedure can be used with the burden-shifting framework we adopt today, with any backpay awarded to an unavailable discriminatee being held in escrow.

ed. 1940). Second, this change will not result in an undue burden on the General Counsel. Rather, this burden allocation relieves a respondent of the impractical burden of proving a negative fact.[16] Further, this burden-shifting framework is also consistent with the obligations already imposed on the General Counsel by the NLRB's Casehandling Manual.

1. The information concerning the discriminatee's job search is within the knowledge of the General Counsel and discriminate

"[I]nformation relevant to whether the discriminatees willfully incurred a loss of earnings is within the knowledge of the discriminatees, not the employer." *NLRB v. Mastro Plastics*, supra at 177. In this connection, in *Starcon International v. NLRB*, 450 F.3d 276 (7th Cir. 2006), the United States Court of Appeals for the Seventh Circuit noted that "[i]t is easier for each employee to produce evidence of what he would have done had he been offered a job than for the employer to produce evidence of what each of the employees would not have done." Id. at 279.

The discriminatee knows at all relevant times what efforts he has made to find work and the degree of success he has achieved. This information is also within the knowledge of the General Counsel because the Regional Office notifies discriminatees of their obligation to mitigate and requires discriminatees to maintain records and give complete accounts of their efforts to find work. See NLRB Casehandling Manual (Part Three) Compliance Section 10582.2 (2007). Further, since the General Counsel presumably has contact with an available discriminatee when he computes net backpay due for the compliance specification, he is likely to know the whereabouts of the discriminatee.

2. Shifting the burden of production places no undue burden on the General Counsel

Because the General Counsel has contact with the discriminatee and already requires him to keep records of his job search, it places no greater burden on the General Counsel to produce either the discriminatee or competent evidence of the discriminatee's job search. It is already customary for the General Counsel to produce the discriminatees at backpay hearings, and the General Counsel in almost all cases will be required to do nothing more than he does now. In the usual situation, if the respondent produces evidence as to the availability of substantially equivalent jobs in the relevant geographic area, the General Counsel calls the discriminatees to testify about their efforts to find interim work. The respondent then has the opportunity to cross-examine the discriminatees on that matter.

The change we make today affects only those rare instances, like the case at bar, when the General Counsel does not present the discriminatee and/or the discriminatee is not available. In such situations, the General Counsel can no longer, as he did here, simply rely on the compliance specification. He will have to produce some competent evidence of the discriminatee's job search.

As noted above, we are not insisting, as did the Second Circuit in *Mastro Plastics*, that the General Counsel make the discriminatee available. We are, however, insisting that the General Counsel produce either the discriminatee or some competent evidence of the discriminatee's job search. In this regard, we agree with the court's reasoning in *Mastro Plastics* that "it is logically within the duty of the Board to produce at the hearing the evidence most relevant" to the question. Id. at 177.

We note also that while the Board currently contemplates cooperation between the General Counsel and a respondent in obtaining the appearance of discriminatees, it does not place any obligation on the General Counsel to do so. In particular, Section 10662.4 of the NLRB's Casehandling Manual, entitled "Scope of the Region's Responsibility for Making Discriminatees Available as Witnesses for Respondent[,]" provides in part as follows:

> Although the General Counsel may decide not to call any discriminatees as witnesses, the respondent will often desire to call discriminatees to prove its case. The trial attorney should cooperate with the respondent in its efforts to obtain the presence of the discriminatees to the extent that it is practicable and reasonable to do so.[174]

[174] For example, *Cornwell Co.*, 171 NLRB 342 fn. 2 (1968) ("[T]he General Counsel's function in producing backpay claimants for examination by Respondent is merely advisory and cooperative.") See also *Iron Workers Local 480 (Building Contractors)*, 286 NLRB 1328, 1334 (1987); and *Colorado Forge Corp.*, 285 NLRB 530, 541 (1987).

Our decision today places an obligation on the General Counsel. That is, after the respondent has come forward with evidence of substantially equivalent available jobs, the General Counsel must produce either the discriminatee or some other competent evidence of the discriminatee's job

[16] "[A]s a practical matter it is never easy to prove a negative . . . ." *Elkins v. United States*, 364 U.S. 206, 218 (1960). "For this reason, fairness and common sense often counsel against requiring a party to prove a negative fact, and favor, instead, placing the burden of coming forward with evidence on the party with superior access to the affirmative information." *Sissoko v. Rocha*, 440 F.3d 1145, 1162 (9th Cir. 2006).

search.[17] The General Counsel's function in producing the discriminatee or evidence of the discriminatee's job search is no longer "merely advisory and cooperative." This is not an undue burden, since the General Counsel produces the discriminatee in the vast majority of cases and since we are not insisting that the General Counsel produce the discriminatee in every instance.

3. The Board's practice as reflected in the Casehandling Manual provides a basis for shifting the burden of production

The NLRB Casehandling Manual requires the Region's Compliance Officer to gather evidence concerning the discriminatee's effort (or lack thereof) to seek employment. We simply hold that the Region (the General Counsel) must present that evidence, rather than hold it back until the Respondent introduces evidence that there was an insufficient effort or no effort at all.

Section 10558.2 of the Casehandling Manual provides as follows:

> The Compliance Officer is responsible for investigating mitigation issues. The discriminatee's account of his or her efforts to obtain employment and of any loss of interim employment will be the primary source of information upon which a determination will be based. Whenever there is a mitigation issue, the discriminatee should give a complete account of his or her efforts to seek employment. Particular attention is appropriate for prolonged periods of unemployment.
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> As set forth in Section 10508.8, the Compliance Officer is responsible for communicating with discriminatees as soon as the Region has determined that a violation has occurred that may result in a backpay remedy. Disputes concerning mitigation may be avoided if the discriminatee is clearly advised at that time of his or her obligation to mitigate; the discriminatee should be further advised to keep careful notes or records of his or her efforts to seek interim employment. Form NLRB-4288 contains such advice.

Compliance with this section puts the relevant information as to the discriminatee's job search within the knowledge of the General Counsel. Requiring the General Counsel to produce this evidence is practical, efficient, and not burdensome.

Section 10660.5 of the Casehandling Manual, which sets out the responsibilities of the General Counsel's trial attorney in dealing with the discriminatees, contemplates that the General Counsel will produce discriminatees to testify about their search for interim employment. This section, entitled "Preparation of Discriminatees for Examination by Respondent" provides as follows:

> Respondent's counsel may often examine discriminatees concerning their efforts to seek work during periods of unemployment. When this is expected, the trial attorney should interview and prepare the discriminatee for testimony concerning the details of interim employment, earnings, expenses, and search for work.
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> [A]ll discriminatees should be cross-examined in preparation for the kind of cross-examination they will receive at the hearing, particularly concerning their efforts to find work during periods of unemployment and low earnings.
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> The trial attorney should review with each discriminatee his/her anticipated testimony regarding interim employment, earnings, expenses, and search for work. Each discriminatee should be prepared to account for his employment history during the backpay period. All relevant documents should be reviewed with each discriminatee to refresh his/her recollection regarding search for work and employment during the backpay period.
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> Each discriminatee should be prepared to testify as precisely as possible regarding the names of the firms where they sought interim employment, whether they filed written applications, the dates they filed applications or made job inquiries, and the names of the individuals they spoke with at each firm.

Casehandling Manual Section 10660.6 contemplates that the General Counsel will produce discriminatees if the respondent asserts a willful loss of earnings. This section advises the trial attorney on how to respond to and prepare for testimony by a respondent's witness concerning labor market conditions:

> [T]o support its contention that a discriminatee failed to mitigate, the respondent counsel may call an expert witness familiar with the labor market in the area where most of the discriminatees were living and seeking work during the backpay period. Where appropriate, in preparation for cross-examination and rebuttal, the trial attorney should interview knowledgeable local officials of the state employment service and knowledgeable union officials, particularly of skilled trades unions, to obtain a complete understanding regarding what impact,

[17] Accordingly, we overrule the cases cited in Sec. 10662.4 of the Casehandling Manual to the extent that they are inconsistent with our decision today. See *Steve Aloi Ford, Inc.*, 190 NLRB 661 (1991); *Woonsocket Health Center*, 263 NLRB 1367 (1982).

> if any, the local market conditions had on the search for work of people with the skills and experience of the discriminatees.
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> . . . .
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> The respondent's witnesses may be expected to testify concerning the number of job vacancies that existed in the employment area during the backpay period. The trial attorney, on the basis of pretrial interviews, should be prepared to elicit testimony concerning not only the number of job vacancies, but the number within the job experience and background of the discriminatees, the rates of pay offered and the number of people remaining unemployed on the rolls of the state employment service or union simultaneous with the existence of the job openings.

In sum, the modification we make today conforms Board law more closely to agency practice and puts the burden of production on the party who has the information relevant to the issue in question. Current practice requires the General Counsel to investigate and maintain evidence concerning a discriminatee's job search. Requiring the General Counsel to simply go forward with the mitigation evidence he already has in his possession is practical, efficient, and nonburdensome.

The dissent asserts that by this decision, as well as other recent Board decisions involving compliance issues, we reduce the effectiveness of the Board's backpay remedies. We firmly disagree. The allocation of burdens we adopt today is aimed at providing a more expeditious resolution of backpay issues and an added degree of certainty to our backpay determinations. We believe it will accomplish both. To award backpay to discriminatees without sufficient regard for a discriminatee's mitigation obligation is inconsistent with public policy. *Grosvenor Resort*, 350 NLRB No. 86, slip op. at 3 (2007), citing *Mercy Peninsula Ambulance Service*, 589 F. 2d 1014, 1017 (9th Cir. 1979).

Conclusion

Accordingly, for all of these reasons, we now hold that when a respondent raises a job search defense and satisfies its burden of coming forward with evidence that there were substantially equivalent jobs in the relevant geographic area available for the discriminatee during the backpay period, the burden shifts to the General Counsel to produce competent evidence of the reasonableness of the discriminatee's job search.

V. DISPOSITION OF THIS CASE

In the case at bar, the Respondent, through the testimony of its employability expert, produced evidence that there were substantially equivalent jobs available during the backpay period in the relevant geographic area for Sides and Tharp, the two discriminatees. The General Counsel—relying on existing Board law requiring the Respondent to establish its affirmative defense—produced neither the discriminatees nor any evidence as to their efforts to find interim work. The judge, also applying existing burdens of production and proof, found that the Respondent failed to produce facts sufficient to show, by a preponderance of the evidence, that the discriminatees failed to mitigate their damages. Accordingly, the judge recommended that the Respondent pay backpay to the discriminatees in the amounts set out in the compliance specification.

Under the approach we adopt today, we find that the evidence presented by the Respondent was sufficient to shift the burden of production to the General Counsel to come forward with competent evidence regarding the reasonableness of the discriminatees' job search. Accordingly, we shall remand this proceeding to the judge for the purposes of reopening the record and allowing the parties to present evidence consistent with our decision today.

ORDER

IT IS ORDERED that this proceeding is remanded to Administrative Law Judge Margaret M. Kern for appropriate action consistent with this Decision and Order.

IT IS FURTHER ORDERED that the judge shall prepare a second supplemental decision setting forth credibility resolutions, findings of fact, conclusions of law, and a recommended Order, as appropriate on remand. Copies of the second supplemental decision shall be served on all parties, after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

Dated, Washington, D.C. September 30, 2007

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Robert J. Battista, Chairman

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Peter C. Schaumber, Member

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Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBERS LIEBMAN and WALSH, dissenting.

Departing from more than 45 years of established precedent, the majority relieves wrongdoers of their burden to produce all of the facts to substantiate the affirma-

tive defense that a discriminatee unreasonably failed to mitigate damages and, instead, requires the General Counsel to produce facts to negate it. The result is to place a stumbling block before discriminatees and, ultimately, to frustrate enforcement of the National Labor Relations Act.

Unfortunately, this is just the latest in a series of cases in which the majority has sought to reduce the effectiveness of the Board's backpay and reinstatement remedies.[1] The result, of course, is to make it less costly for an employer to violate the Act. We have dissented in those cases, and we are compelled to do so again here.

I.

In the underlying unfair labor practice proceeding, the Board found that the Respondent, which performs warehousing services in Kearney, New Jersey, violated Section 8(a)(1) and (3) of the Act when it discharged employees Leonard Sides, a forklift operator, and Jesse Tharp, a warehouse worker.[2] The Board ordered the Respondent, among other things, to make Sides and Tharp whole.

The General Counsel subsequently issued a compliance specification setting forth the backpay claimed for Sides and Tharp, and explaining how the amounts were calculated. At the October 8, 2002 backpay hearing, the General Counsel introduced the specification into evidence, and the Respondent concedes that in so doing the General Counsel satisfied his burden to establish the gross backpay owed to Sides and Tharp.

In turn, the Respondent asserted as an affirmative defense that Sides and Tharp were not entitled to backpay because they had unreasonably failed to mitigate their damages, specifically, that each had made insufficient efforts to find interim employment. That claim was not based on information gathered from the discriminatees. Although the Respondent was aware of Sides' and Tharp's addresses, it made no effort to procure their appearance or otherwise secure their testimony (e.g., by affidavit or deposition).

The Respondent adduced testimony from Donna Flannery, a vocational employability specialist. Flannery had not interviewed Sides or Tharp, or anyone who was familiar with their job search efforts. Rather, Flannery had conducted a labor market study in the New Jersey area to determine the availability of jobs for warehousemen, forklift operators, and similar occupations during the backpay period. Based on that study, Flannery testified that a sufficient number of comparable jobs were available during the backpay period and that neither Sides nor Tharp had diligently sought interim work.

In its posthearing brief, the Respondent argued that Flannery's testimony warranted an inference that the discriminatees had not made a reasonable effort to find work. That inference, the Respondent further argued, shifted the burden back to the General Counsel to produce evidence of what efforts the discriminatees actually made. The judge flatly rejected the Respondent's position. The judge pointed to settled Board precedent holding that "it is the employer, not the General Counsel, which must produce facts to show that no backpay is owed because the claimants failed to mitigate their damages." The judge then found that Flannery's testimony failed to establish that Sides' and Tharp's mitigation efforts were unreasonable. Accordingly, the judge concluded that Sides and Tharp were entitled to backpay in the amounts alleged in the specification. We agree.

In its exceptions to the judge's findings, the Respondent again argues that the judge should have required the General Counsel to produce evidence of the discriminatees' efforts to find interim employment once the Respondent showed that there were comparable jobs available. As indicated above, and explained below, the majority has wrongly accepted that argument.

II.

For years, the Board has effectively remedied discrimination in employment by adhering to a set of well conceived and well accepted backpay principles. Those principles are worth reviewing here. The finding of an unfair labor practice is presumptive proof that some backpay is owed. *Arlington Hotel Co.*, 287 NLRB 851, 855 (1987), enfd. in relevant part 876 F.2d 678 (8th Cir. 1989). Accordingly, the General Counsel's "sole burden" in a typical compliance proceeding is to establish "the gross amounts of backpay due—the amount the employees would have received but for the employer's illegal conduct." *La Favorita, Inc.*, 313 NLRB 902 (1994), enfd. mem. 48 F.3d 1232 (10th Cir. 1995). If the General Counsel meets that burden, "the burden is on the employer to establish facts which would negative the

[1] See, e.g., *Grosvenor Resort*, 350 NLRB No. 86 (2007) (Member Walsh dissenting) (denying backpay to discriminatees for not seeking work quickly enough and for not seeking interim employment while waiting for previously secured interim employment to commence); *Oil Capitol Sheet Metal*, 349 NLRB No. 118 (2007) (Members Liebman and Walsh dissenting) (expanding the General Counsel's burden in salting cases to present affirmative evidence that a union salt, if hired, would have worked for the respondent for the claimed backpay period); *Aluminum Casting & Engineering Co.*, 349 NLRB No. 18 (2007) (Member Walsh dissenting) (denying employees full backpay for an unlawfully withheld wage increase); and *Georgia Power Co.*, 341 NLRB 576 (2004) (denying an employee an unlawfully withheld promotion because the General Counsel failed to prove that the employee "certainly" would have been promoted); *Toering Electric Co.*, 351 NLRB No. 18 (2007).

[2] 331 NLRB 454 (2000), enfd. mem. 261 F.3d 493 (3d Cir. 2001).

existence of liability to a given employee or which would mitigate that liability," including willful loss of earnings. *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963); see also *Velocity Express*, *Inc.*, 342 NLRB 888, 889–890 (2004), enfd. 434 F.3d 1198 (10th Cir. 2006).

In particular, where a respondent claims that a discriminatee unreasonably failed to search for interim employment, the respondent must show that there were sources of actual or potential employment that a discriminatee failed to explore. It must also show if, where, and when the discriminatee would have been hired had he applied. See *Aero Ambulance Service*, *Inc.*, 349 NLRB No. 115, slip op. at 7 (2007); *Champa Linen Service Co*., 222 NLRB 940, 942 (1976).

The Board has long adhered to those principles, and for good reasons.

III.

To begin, the Board's requirement that a respondent come forward with facts to substantiate affirmative defenses to backpay, including an alleged failure to mitigate, is consistent with the general rule that a party asserting an affirmative defense has the burden of producing evidence to support it. See *Flying Food Group*, *Inc. v. NLRB*, 471 F.3d 178, 184 fn. 5 (D.C. Cir. 2006). The Board's approach is also consistent with the Supreme Court's oft-quoted observation that the "most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265 (1946), cited in *Rainbow Coaches*, 280 NLRB 166, 168 (1986), enfd. mem. 835 F.2d 1436 (9th Cir. 1987), cert. denied 487 U.S. 1235 (1988); see also *Minette Mills*, *Inc.*, 316 NLRB 1009, 1011 (1995).

By incorporating those principles, the Board's traditional approach to failure to mitigate claims permits the General Counsel to focus his limited resources on the gross economic harm caused by a respondent's unfair labor practices. Ultimately, the Board's approach furthers both the General Counsel's role as a representative of the public interest, not the interests of private litigants, see *Philip Carey Mfg. Co.,* 331 F.2d 720, 734 (6th Cir. 1964), cert. denied 379 U.S. 888 (1964), and the accepted notion that "a backpay remedy is not a private right but is a public right granted to vindicate the policies of the Act." *State Journal*, 238 NLRB 388 (1978). Accord *NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263 (1969) (emphasizing that the purpose of backpay is "to vindicate the public policy of the [Act] by making the employees whole for losses suffered on account of an unfair labor practice.").

Equally important, the Board's approach preserves the practical utility of the backpay remedy. The United States Court of Appeals for the Fifth Circuit made that point in *NLRB v. Miami Coca-Cola Bottling Co*., 360 F.2d 569 (1966). There, the court refused to adopt a rule that an employer's proof of "incredibly low" interim earnings by a discriminatee sufficed to shift to the General Counsel the burden of producing evidence that the discriminatee used reasonable efforts to find interim work. The court explained:

> It is not practical, and it would significantly hamper the backpay remedy, if each discriminatee were required to prove the propriety of his efforts during the entire backpay period.

Id. at 575. Indeed, in any backpay proceeding, particularly one litigated years after the operative events, there may be gaps in the record. They should be held against the wronged parties. See *NLRB v. Remington Rand*, *Inc.*, 94 F.2d 862, 872 (2d Cir. 1938), cert. denied 304 U.S. 576 (1938) (it appropriately "rest[s] upon the tort-feasor to disentangle the consequences for which it was chargeable from those from which it was immune.").

Last, but not least, the Board's traditional approach to backpay and, in particular, claims that a discriminatee has incurred a willful loss of earnings, offers clear, predictable rules that have ably served the Board, the labor bar, and litigants for more than 4 decades.

Given those positive attributes of the Board's established precedent, it is hard to discern any compelling reason to break with that precedent. As we show below, the majority has failed to provide any persuasive reasons for the change it makes today.

IV.

The majority asserts that it is necessary to shift the burden of production from the wrongdoer respondent to the General Counsel in certain instances because: (a) the Board's approach "has not been universally accepted" by the courts; (b) there are "practical reasons" for making that change; (c) that change places no "undue burden" on the General Counsel; and (d) that change has a basis in the Casehandling Manual. There is no merit to any of those asserted justifications.

The majority asserts that the Board's current approach of requiring wrongdoer respondents to go forward with evidence that a discriminatee unreasonably failed to apply for available jobs "has not been universally accepted" by the courts. In fact, the weight of judicial authority supports or is consistent with the Board's approach.[3] To

[3] See *NLRB v. Mooney Aircraft*, 366 F.2d 809, 813–814 (5th Cir. 1966) (holding that the Board need not produce the testimony of each and every backpay claimant because that requirement would place an

be sure, in *NLRB v. Mastro Plastics Corp*., 354 F.2d 170 (2d Cir. 1965), cert. denied 384 U.S. 972 (1966), the Second Circuit's conclusion that the General Counsel had the burden of producing testimony by each discriminatee that "a willful loss of earnings was not incurred" runs counter to the Board's approach. Id. at 175. However, as that court itself subsequently acknowledged, it has been the *Mastro Plastics* rule, not the Board's approach, that has ultimately "failed to inspire universal adherence or enthusiasm." *NLRB v. Ferguson Electric Co.*, 242 F.3d 426, 435 fn. 6 (2d Cir. 2001).[4] Thus, an alleged lack of success in the courts cannot be the reason for the change the majority makes today.

The majority next offers assertedly practical reasons for the burden-shifting rule it announces today. The majority argues that the General Counsel presumably will have information concerning a discriminatee's interim job search and whereabouts because the Regional Offices advise discriminatees of their obligation to maintain records of and account for their mitigation efforts. There are serious flaws in that argument.

There are good reasons to question the presumption that the General Counsel will be fully informed of a discriminatee's mitigation efforts and location. As explained above, the General Counsel is not the discriminatee's lawyer, and the Board's regional offices necessarily depend on the discriminatee's cooperation in reporting efforts to find interim employment. Moreover, although discriminatees are requested to periodically complete forms regarding their mitigation efforts, those forms rarely offer complete information. For those reasons, we are skeptical of the majority's presumption. As the Fifth Circuit stated in *NLRB v. Mooney Aircraft*, 366 F.2d 809, 813–814 (1966): "[W]e are not entirely convinced that the employees' knowledge about their efforts to find interim work and the financial success they encountered can realistically be imputed to the Board." For the same reasons, one cannot fairly presume that the General Counsel will be aware of a discriminatee's whereabouts.

In any event, the majority's presumption utterly ignores the fact that a respondent is often just as likely, if not more likely, to have access to a discriminatee. Where a respondent has unlawfully discharged or refused to hire an employee, the usual Board order requires the respondent to offer the discriminatee employment and notify him in writing that the unlawful action has been expunged from the respondent's records. See, e.g., *Electric*, *Inc.*, 335 NLRB 315 (2001) (observing that the respondent knew the backpay claimants' locations and how to contact them, as the respondent had made telephonic offers of employment to them). By the time of a compliance proceeding, the discriminatee may even have accepted the respondent's offer and returned to work. In the usual case, then, there is little reason to presume that the General Counsel is better positioned than a respondent to gather information from a discriminatee.

The majority's "no undue burden" argument fares no better. Requiring the General Counsel to produce evidence of potentially each and every discriminatee's mitigation efforts is indeed onerous. The practical reality is that a discriminatee may fail to keep adequate records of his mitigation efforts or to stay in contact with the General Counsel at all. And, as should be obvious, the majority's new rule will impose much greater burdens on our regional personnel both to maintain contact, from the inception of every discharge case, with every potential discriminatee, and to keep records of their job searches.

Moreover, as with its "access" argument, the majority simply fails to consider the burdensomeness question from the respondent's standpoint. As explained, a respondent's access to a discriminatee may well be equal to or greater than that of the General Counsel. To the extent there is uncertainty on this issue, it should be resolved against a respondent, as the wrongdoer. In the present case, for example, the Respondent was aware of Sides' address and was provided Tharp's address by the General Counsel. Nevertheless, the Respondent apparently made no effort whatsoever to procure their appearance at the hearing, or to otherwise gather mitigation information from them. As a result, so far as the record shows, the Respondent's failure to secure that information resulted not from any burdensomeness of the task, but its own neglect.

As a final point on the burdensomeness question, the majority asserts that the change it is making today "af-

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"intolerable burden" on the agency); *Florence Printing Co. v. NLRB*, 376 F.2d 216, 223 (4th Cir. 1967), cert. denied 389 U.S. 840 (1967) (agreeing with *Mooney Aircraft*); *NLRB v. Brown & Root*, 311 F.2d 447, 454 (8th Cir. 1963) (rejecting the respondent's argument that the Board should bear the burden of proof on such issues as an employee's availability for employment, the availability of employment, the amount of interim earnings, and the reasonableness of a discriminatee's mitigation efforts); *NLRB v. S.E. Nichols of Ohio*, *Inc*., 704 F.2d 921, 924 (6th Cir. 1983) (The *employer* bears the burden of establishing deductions from gross back pay such as interim earnings or willful failure to seek other employment.) (emphasis in original).

[4] Indeed, as the majority acknowledges, *Ferguson Electric* retreats from *Mastro Plastics* insofar as the court identified several situations in which the *Mastro Plastics* rule would not apply. See *Ferguson Electric*, supra, 242 F.3d at 434–435. The D.C. Circuit is the only court that endorsed the *Mastro Plastics* rule, in its first flowering, see *NLRB v. Rice Lake Creamery Co.*, 365 F.2d 888, 892 (D.C. Cir. 1966), and there is some question as to whether that court would actually apply it today. See *NLRB v. The Madison Courier*, *Inc.*, 472 F.2d 1307, 1318 fns. 31 and 32 (D.C. Cir. 1972) (the burden is upon the employer to establish facts which would negative the existence of liability), quoting *NLRB v. Brown & Root*, *Inc*., 311 F.2d 447, 454 (8th Cir. 1963)).

fects only those rare instances, like the case at bar, when the General Counsel does not present the discriminatee and/or the discriminatee is not available." But "rare instances" hardly justify a major departure from longstanding precedent. The Board's established backpay procedures have consistently proved capable of accommodating those "rare instances." Significantly, among those procedures is an escrow procedure, which the Board, with court approval, has used to deal with situations where a discriminatee is temporarily unavailable or cannot be located.[5] That procedure might have been implemented here had the Respondent bothered to pursue it.

Finally, the majority posits that the Board's practice as reflected in the Casehandling Manual provides a basis for shifting the burden of production to the General Counsel. The Casehandling Manual, however, is issued by the General Counsel, not the Board, and the Board has repeatedly stated, with court approval, that it is not binding authority on the Board. See, e.g., *NLRB v. Cedar Tree Press, Inc.*, 169 F.3d 794, 796, and cases cited in fn. 2 (3d Cir. 1999); *Sioux City Foundry Co. v. NLRB*, 154 F.3d 832, 838 (8th Cir. 1998), citing *Children's National Medical Center*, 322 NLRB 205, 205 fn. 1 (1996). Indeed, the Casehandling Manual expressly states in its introduction that it is not intended to be and should not be viewed as binding procedural rules, even on the General Counsel's regional office personnel. The advice offered by the Manual embodies a set of optimal practices, to be employed where resources permit. In these times, however, where we consistently must ask regional personnel to do more with less, the Manual is noteworthy but no basis for abandoning more than 45 years of settled precedent.

V.

There are sound, legal, policy, and practical reasons to adhere to the Board's traditional rule that a respondent asserting the affirmative defense of willful loss of earnings must produce the facts to support it. Contrary to the majority's claim, there is nothing "cogent" about its reasons for abandoning that rule, only exaggerated claims about its judicial reception, unsupported and one-sided practical concerns, and nonbinding litigation advice from the General Counsel. We would adhere to the Board's longstanding rule, and we dissent from our colleagues' precipitous decision to overrule it.

[5] See *NLRB v. Brown & Root*, 311 F.2d 447, 455 (8th Cir. 1963); NLRB Casehandling Manual (Part Three) Compliance Section 10582.3.

The majority's "rare instances" assumption is highly questionable; in the past year alone, two more such "rare" cases have reached the Board. *Painting Co.*, 351 NLRB No. 6 (2007); *Parts Depot*, 348 NLRB No. 9 fn. 19 (2006).

Dated, Washington, D.C. September 30, 2007

Wilma B. Liebman, Member

Dennis P. Walsh, Member

NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, dissenting.

I join Member Walsh's dissent wholeheartedly. As he points out, today's decision continues the Board's recent trend of weakening the backpay remedy under the National Labor Relations Act.

That trend is especially unfortunate because the Act's backpay remedy has long been widely recognized as terribly weak to begin with.[1] As Professor Paul Weiler has observed:

> At first blush, the backpay award might seem to serve both remedial and deterrent functions. Although from the employees' point of view the award is merely compensation for what has been lost, from the employer's point of view it is a financial penalty. . . . The problem is that this "fine" . . . is far too small to be a significant deterrent.

Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization under the NLRA*, 96 Harv. L. Rev. 1769, 1789 (1983). The small size of backpay awards, Professor Weiler explains, stems from rules like the one involved in this case, which focus on the net loss to a discharged employee and which impose a duty to mitigate. "If the backpay remedy were designed to deter the employer's unlawful conduct, there would be no reason to deduct any wages that the employee earned, or could have earned, in another job." Id. at 1789–1790.

[1] In the words of Professor Cynthia Estlund, the Act's reinstatement and backpay remedies "may be seen as a minor cost of doing business by an employer committed to avoiding unionization." Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 Colum. L. Rev. 1527, 1537 (2002). Professor Estlund points out that the Act's remedies are considerably weaker than those available under other federal and state statutes protecting employees. Id. at 1551–1555.

For a representative sample of the criticism of the Board's backpay remedy, see Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 Berkeley J. Emp. & Labor L. 223, 234 & fn. 38 (2005); Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States under International Human Rights Standards* (2000), available at www.hrw.org/reports/2000/uslabor/USLBR008-05.htm; Joseph E. Slater, *The "American Rule" That Swallows the Exceptions*, 11 Employee Rts. & Emp. Pol'y J. 53, 79-82 (2007); Robert M. Worster, III, *If It's Hardly Worth Doing, It's Hardly Worth Doing Right: How the NLRA's Goals Are Defeated Through Inadequate Remedies*, 38 U. Rich. L. Rev. 1073, 1083 (2004).

Today's decision, unfortunately, moves the Board's remedies in the wrong direction, assuming that encouraging employers to obey the law is our goal.

Dated, Washington, D.C. September 30, 2007

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

Laura Elrashedy, Esq., for the General Counsel.
John A. Craner, Esq., for Respondent.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

MARGARET M. KERN, Administrative Law Judge. This supplemental proceeding was tried before me in Newark, New Jersey, on October 8, 2002. A compliance specification and notice of hearing was issued on May 28, 2002, predicated on a decision and order of the Board dated June 23, 2000 (331 NLRB No. 55), which provided that St. George Warehouse (Respondent) take certain affirmative action, including that of making its employees Leonard Sides and Jesse Tharp whole for their losses resulting from Respondent's unfair labor practices in violation of Section 8(a)(1) and (3) of the Act. On April 23, 2001, the United States Court of Appeals for the Third Circuit entered judgment enforcing the Board's Order (261 F.3d 493). On June 5, 2001, the Court entered its amended judgment enforcing the Board's order.

I. GENERAL PRINCIPLES

The purpose of a backpay award is to make whole the employee who has been discriminated against as the result of an unfair labor practice. The employee is entitled to receive what he would have earned normally during the period of the discrimination against him, less what he actually earned in other employment during that period. An employee must use reasonable diligence to find employment during the period of discrimination, and is not entitled to backpay for periods during which he voluntarily remained idle. *NLRB v. Brown & Root, Inc.,* 311 F.2d 447, 452 (8th Cir. 1963).

II. FINDINGS OF FACT

A. Calculation of Backpay

Tharp was employed by Respondent as a warehouse worker and Sides was employed as a forklift operator. Respondent admits the backpay period commenced on March 16, 1999, for Tharp and on March 31, 1999, for Sides. The backpay period for both individuals ended on September 1, 2000. Respondent does not challenge the General Counsel's method of calculating the backpay amounts for Tharp and Sides.

In paragraph 2 of the amended backpay specification, it is alleged that the average number of overtime hours worked by all warehouse employees in 1999 was 7.385-hours-per week, and that the average in 2000 was 4.324-hours-per week. In paragraphs 11 and 22, however, it is alleged that overtime was calculated on the basis of 7.35-hours-per week in 1999 and 4.324-hours-per week in 2000. Because of this unexplained discrepancy for the year 1999, I have computed overtime hours for that year at the lower average of 7.35-hours-per week. Based on these revised calculations, Tharp is owed net backpay in the amount of $22,951.81, and Sides is owed net backpay in the amount of $33,066.30. It is agreed that Respondent made payments to Tharp and Sides of $8,302.02 and $6,618.40, respectively, reducing Respondent's potential liability to Tharp to $14,649.79, and to Sides to $26,447.90.

B. Respondent's Defense of Mitigation

1. Sides' unavailability to work overtime due to medical condition

Respondent contends that Sides' would have been unable to work overtime during the backpay period due to a medical condition, and that the backpay amount should be reduced accordingly.

Payroll records introduced by counsel for the General Counsel show that in the 32-week period prior to his discharge, Sides' worked overtime in 23 weeks. The records further show Sides' worked overtime in the 5 consecutive weeks immediately prior to his discharge.

Respondent attempted to introduce selected portions of the General Counsel's compliance file that had been provided to him. Respondent did not call a witness to lay a foundation for these documents, but rather sought to introduce the documents by way of stipulation. Counsel for the General Counsel refused to stipulate to the introduction of selected documents on the ground that they did not represent the full efforts of the claimants to find work. Counsel for the General Counsel had no objection to the introduction of the complete file. Counsel for Respondent declined to stipulate to the introduction of the complete file, insisting that he could "pick and choose" documents from the file. In the absence of either a stipulation or a witness, I sustained the General Counsel's objection to the proffer of selected documents, and I adhere to that ruling. On her rebuttal case, counsel for the General Counsel sought to introduce a portion of the investigative file for Sides. Counsel for Respondent objected on the grounds that the documents were "rank hearsay." I sustained the objection, and I adhere to that ruling.

No evidence was introduced regarding any medical condition of Sides.

2. Failure of Tharp and Sides to seek interim employment

Respondent does not challenge the accuracy of the General Counsel's calculation of interim earnings. According to those calculations, Sides' earned $520.85 in the fourth quarter of 1999, and $1,550.00 in the first quarter of 2000. Tharp earned $4,971.23 in the fourth quarter of 1999, and $5,875.09, $5,875.09, and $4,067.37 in the first three quarters of 2000, respectively.

Respondent contends that neither Tharp nor Sides made sufficient effort to seek interim employment. In support of that defense, Respondent called Donna Flannery, a vocational employability specialist. Flannery conducted a labor market study in the New Jersey area to determine the availability of jobs for warehousemen, forklift operators, and similar occupations during the backpay period. Flannery's research included an exami-

nation of a several published sources, including the *Dictionary of Occupational Titles, Occupational Employment Statistics. Projections 2008, New Jersey Employment and Population in the 21st Century*, as well as want ads in local newspapers. She also performed an analysis of the transferability of job skills. Flannery concluded that a sufficient number of jobs were advertised as open and available during the backpay period for warehouse workers, forklift operators, and similar jobs.

Flannery did not interview either Tharp or Sides. She did, however, make the following observation:

> It is also my opinion, based upon the information presented, that neither of these two job seekers made a diligent effort to seek and obtain new employment. It appears, from the information presented, that job efforts did not even consist of a minimal amount of effort to locate employment. Minimally, the advertisements could have been reviewed for openings. There were plenty of resources available, at no cost, such as assistance in reviewing/composing cover letters and resumes, and they could have sought openings through internet job sites, explored industrial directories for companies with suitable openings, researched magazines or publications in the warehouse industry for leads, and networked through job fairs and open houses.

Neither Sides' nor Tharp testified. Nor did anyone with any knowledge of their actual efforts to find employment testify.

3. Tharp's relocation to Florida

Respondent contends that Tharp moved to Florida during the backpay period, thereby removing himself from the employment market in New Jersey and making him unavailable for employment with Respondent.

In appendix 2 of the backpay specification, it is stated that Tharp commenced work at Naples Lumber on or about October 18, 1999, where he continued to work through the end of the backpay period. Counsel for the General Counsel introduced a letter dated July 17, 2002, sent by her to Respondent's counsel, informing him that Tharp was then incarcerated in the Collier County Jail in Naples, Florida.

III. ANALYSIS

A. Burdens of proof

Respondent concedes that the General Counsel has satisfied its burden to establish the gross amount of backpay in this case, and Respondent acknowledges that failure to mitigate is the sole issue. Respondent contends, however, that it does not bear the burden of proof on the issue of mitigation. Rather, it is Respondent's contention that once it was shown that a significant number of jobs were available to the claimants, a fact established by the testimony of its vocational expert, an inference was created that the claimants did not make a reasonable effort to find work. The creation of that inference, according to Respondent, is sufficient to shift the burden back to the General Counsel to prove what efforts were actually made by the claimants and whether those efforts were reasonable. I disagree.

The finding of an unfair labor practice is presumptive proof that some backpay is owed and in a backpay proceeding, the sole burden on the General Counsel is to show the gross amounts of backpay due, that is, the amount the employee would have received but for the employer's illegal conduct. Once that is established, it is the employer, not the General Counsel, which must produce facts to show that no backpay is owed because the claimants failed to mitigate their damages. *United States Can Co.,* 328 NLRB 334 (1999). That burden remains exclusively on the employer and does not under any circumstances shift back to the General Counsel.

B. Mitigation defense

Respondent avers that its backpay liability should be reduced on three grounds: first, that Sides would not have been available to work overtime during the backpay period because of a medical condition and that overtime should not be included in the backpay calculation; second, that neither Sides nor Tharp made sufficient efforts to seek interim employment: and third, that Tharp moved to Florida and took himself out of the New Jersey labor market and made him unavailable to return to work for Respondent. There is no factual basis for any of Respondent's assertions.

Contrary to Respondent's first claim, the evidence shows that Sides' worked overtime right up to the time of his discharge, and there is no evidence that Sides suffered from a medical condition that would have precluded him from continuing to work overtime during the backpay period. Respondent's first claim is therefore without merit.

With respect to Respondent's second claim regarding the sufficiency of the claimants' search for interim employment, the test is whether the record as a whole establishes the claimants' diligently sought other employment during the entire backpay period, and they are to be held only to reasonable exertions in this regard, not the highest standard of diligence. *Rainbow Coaches*, 280 NLRB 166, 80 (1986). The claimants should receive the benefit of any doubt rather than the employer, the wrongdoer responsible for the existence of any uncertainty and against whom any uncertainty must be resolved. *La Favorita, Inc.,* 313 NLRB 902, 903 (1994). Applying these principles, the record demonstrates that Sides worked in two out of the seven quarters covered by the backpay period; Tharp worked in four out of seven. Even accepting Flannery's testimony that warehouse and forklift operator jobs were available during those periods when Sides and Tharp were not employed, there is no evidence from which to conclude that Sides and Tharp failed to seek out those jobs. Flannery's opinion that neither individual made even a "minimal amount of effort to locate employment" is devoid of any factual support in this record given her admission that she did not interview Sides or Tharp, nor did she interview anyone who was knowledgeable of their job search efforts. Respondent has therefore failed to satisfy its burden of proving that Sides and Tharp neglected to make reasonable efforts to find work.

Respondent's third claim is that Tharp removed himself from the New Jersey labor market when he relocated to Florida during the backpay period, and he is therefore not eligible for backpay. The fact is that Tharp obtained work in Florida and Respondent's backpay liability has been reduced in this case as a result of the interim earnings earned by Tharp while in Florida. A discharged employee is not confined to the geographic area of former employment; he or she remains in the labor mar-

ket by seeking work in any area with comparable employment opportunities. *Best Glass Co.*, 280 NLRB 1365, 1370 (1986), citing *Mandarin v. NLRB*, 621 F.2d 336 (9th Cir. 1980). There is no evidence to establish when Tharp moved to Florida, or that he moved to Florida for nonwork related reasons, or that he removed himself from the labor he moved to Florida for nonwork related reasons, or that he removed himself from the labor market at any time during the backpay period. If anything, the evidence suggests that Tharp moved to Florida to seek employment, and that he was successful in that effort. To the extent that there is any ambiguity on this point, the benefit of the doubt goes to Tharp, not Respondent.

Respondent has, in sum, failed to produce facts sufficient to show, by a preponderance of the evidence, that the discriminatees failed to mitigate their damages. I therefore find Respondent owes to Leonard Sides net backpay in the amount of $26,447.90, and owes to Jesse Tharp net backpay in the amount of $14,649.79.

CONCLUSION

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[1]

ORDER

Respondent, St. George Warehouse, Kearney, New Jersey, its officers, agents, successors, and assigns, shall

1. Pay to Leonard Sides $26,447.90 as net backpay, with interest computed thereon in the manner prescribed in the Board's Decision and Order and making the appropriate deductions from said amounts of any tax withholding required by state and federal laws.

2. Pay to Jesse Tharp $14,649.79 as net backpay, with interest computed thereon in the manner prescribed in the Board's Decision and Order and making the appropriate deductions from said amounts of any tax withholding required by state and federal laws.

Dated: Washington D.C. October 30, 2002

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.